Supreme Court, U.S.
FILED
AUG 23 2010
OFFICE OF THE CLERK

169

(2)

No. 10-116

In the

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, et al.,
Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICI CURIAE OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, WESTLANDS WATER DISTRICT, AND SAN LUIS WATER DISTRICT IN SUPPORT OF PETITIONERS

EILEEN M. DIEPENBROCK
JON D. RUBIN
ANTHONY J. CORTEZ
Diepenbrock Harrison, P.C.
400 Capitol Mall
Sacramento, CA 95814
Telephone: (916) 492-5000
Facsimile (916) 446-4535
ediepenbrock@diepenbrock.com

*DAMIEN M. SCHIFF
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834
Telephone. (916) 419-7111
Facsimile (916) 419-7747
dms@pacificlegal.org

GARY SAWYERS
Sawyers & Holland, LLP
652 W. Cromwell Ave , Ste 101
Fresno, CA 93711
Telephone (559) 438-5656
gsawyers@sawyerslaw.com

Counsel for Amici Curiae San Luis & Delta-Mendota Water Authority, Westlands Water District, & San Luis Water District

QUESTION PRESENTED

Federal reclamation law governs the rights and responsibilities of landowners receiving water for irrigation from federal reclamation projects under contracts with the Bureau of Reclamation. *See generally* 43 U.S.C. §§ 371 *et seq*. It has long been a principle of reclamation law that "the Government's 'ownership' of the water rights" in project water is "at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983). As a consequence, once landowners fulfill their contractual obligation to repay the cost of constructing the project works, they obtain a permanent water right and other important entitlements under reclamation law. *See* 43 U.S.C. §§ 372, 390mm, 431, 541. The question presented is:

Whether the Government may deprive landowners of the ability to acquire a permanent water right and other reclamation law entitlements by limiting landowners to perpetually extending ten-year "water utility" contracts under 43 U.S.C. § 485(e).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE WRIT 8

I. THE FEDERAL CIRCUIT'S DECISION WILL HAVE NATIONWIDE IMPACT 8

A. The Federal Circuit's Decision Unjustifiably Treats All Section 9(e) Contracts Alike, and Improperly Characterizes the Obligations of Section 9(e) Contract Holders 10

B. The Federal Circuit's Decision Gravely Mischaracterizes the Nature of the Payments Made by Both Short- and Long-Term Section 9(e) Contract Holders 13

II. THE FEDERAL CIRCUIT'S DECISION CREATES MUCH UNCERTAINTY FOR FEDERAL WATER CONTRACT HOLDERS, PARTICULARLY IN CALIFORNIA, BY INCREASING THE RISK THAT THESE CONTRACT HOLDERS WILL LOSE IMPORTANT RIGHTS UNDER STATE LAW 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Arizona v. California, 460 U.S. 605 (1983) 16

Cent. Delta Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002) 2

Consol. Delta Smelt Cases, 2010 U.S. Dist. LEXIS 62006 (E.D. Cal. May 27, 2010) 9-10

Ivanhoe Irrigation Dist. v. All Parties & Persons, etc., 350 P.2d 69 (Cal. 1960) 9

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958) 8-9

Kidd v. Laird, 15 Cal. 161 (1860) 17

Latino Issues Forum v. EPA, 558 F.3d 936 (9th Cir. 2009) 15

Nevada v. United States, 463 U.S. 110 (1983) 4

State Water Resources Control Board Cases, 136 Cal. App. 4th 674 (2006) 2, 17

Tehama-Colusa Canal Auth. v. United States DOI, 2010 U.S. Dist. LEXIS 64213 (E.D. Cal. June 28, 2010) 15-16

United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) 2

United States Statutes

Endangered Species Act, 16 U.S.C. §§ 1531-1544 9

TABLE OF AUTHORITIES—Continued

Page

43 U.S.C. § 371, *et seq.* 4

§ 485a(d) 14

§ 485a(e) 14

§ 485f(b) 7, 14

§ 485h(d) 4-8, 10-14, 17

§ 485h(e) 1-8, 10-18

§ 485h-1(2) 6

§ 485h-1(3)-(4) 6

§ 485h-1(6) 6

§§ 485h-1 to 485h-6 5

Public Law 99-546, 100 Stat. 3051-52 . . . . . 3, 12, 15

California Statutes

Cal. Water Code
§§ 1702, 1706, 1707, 1725, 1736 17

§ 34000, *et seq.* 3

Miscellaneous

U.S. Bureau of Reclamation, *The CVP Today*, *available at* www.usbr.gov/mp/cvp/about.html (last visited Aug. 19, 2010) 2

The San Luis & Delta-Mendota Water Authority ("Water Authority"), Westlands Water District ("Westlands") and San Luis Water District ("San Luis") respectfully submit this brief *amici curiae* in support of the petition for writ of certiorari filed by Grant County Black Sands Irrigation District and Williamson Land Company.[1]

INTEREST OF *AMICI CURIAE*

The issues presented in this case, dealing with the interpretation and application of water contracts executed under 43 U.S.C. § 485h(e) (Section 9(e) contracts), are critically important to entities throughout the Western United States that contract with the United States for water from federal reclamation projects. The Federal Circuit's decision considers whether Reclamation must afford the benefits of Section 9(d) and long-term Section 9(e) contracts to those who have short-term Section 9(e) contracts. Pet. App. 9a. In holding that short-term Section 9(e) contracts enjoy few if any of the benefits accorded Section 9(d) and long-term Section 9(e) contracts, the Federal Circuit made a number of characterizations of Section 9(e) contracts generally that are inconsistent with federal reclamation law and threaten substantially to undercut Section 9(e)

---

[1] Pursuant to Supreme Court Rule 37, Amici Curiae state that counsel for both parties have consented in writing to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice of the intent of the Amici to file a brief at least ten days prior to the brief's filing. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Amici, made a monetary contribution to its preparation.

contract holders' rights. Among these entities are Amici, which contract or represent interests that contract for water developed by the federal Central Valley Project (CVP), the largest federal reclamation project located within the State of California.

The United States Department of the Interior's Bureau of Reclamation ("Reclamation") owns the CVP, which brings water from areas of California where supply is plentiful but demand low, to regions where demand is great but supplies lacking. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-29 (1950). The CVP was originally conceived as a State of California project. Because of the Great Depression, the State was unable to finance the project. Most of the water development envisioned by the State was accomplished by the federal CVP, beginning with the project's initial authorization in 1935. Work began on the CVP in 1937 and its last major facility was completed in 1979. *See State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 691-92 (2006). The CVP is comprised of 20 dams and reservoirs, 11 powerplants, and 500 miles of major canals as well as conduits, tunnels, and related facilities. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002); *see also* U.S. Bureau of Reclamation, *The CVP Today*, *available at* www.usbr.gov/mp/cvp/about.html (last visited Aug. 19, 2010). CVP water is now used by hundreds of long-term Section 9(e) contractors that put the water to agricultural use on thousands of farms covering millions of acres. *See State Water Resources Control Board Cases*, 136 Cal. App. 4th at 692.

The Water Authority, formed in 1992 under California law as a joint powers authority, consists of

twenty nine public agencies, twenty seven of which contract with Reclamation for CVP water. Twenty two of the Water Authority's member agencies hold long-term Section 9(e) contracts. Reclamation conveys CVP water available under those long-term Section 9(e) contracts primarily through the Sacramento-San Joaquin River Delta ("Delta") region of California. As required by Section 105 of Public Law 99-546, 100 Stat. 3051-52, each of the Section 9(e) contracts held by the Water Authority's member agencies includes a provision to ensure Reclamation recovers the capital investment in the CVP by the year 2030.

CVP water made available to the Water Authority's member agencies supports approximately 1.2 million acres of agricultural lands, as well as 51,500 acres of private waterfowl habitat, in California's Central Valley. The member agencies' CVP water also supplies municipal and industrial uses in Silicon valley, as well as 1 million townfolk in the Silicon Valley and the Central Valley.

Westlands and San Luis, members of the Water Authority, are California water districts formed pursuant to California Water Code section 34000, *et seq.* Westlands and San Luis use CVP water for irrigation of approximately 550,000 acres on the west side of the Central Valley in Fresno, Kings, and Merced Counties, California, as well as for municipal and industrial purposes within those counties. Farmers within Westlands and San Luis produce more than 60 high-quality commercial food and fiber crops sold for the fresh, dry, canned, and frozen food markets, both domestic and export. More than 50,000 people live and work in the communities that are

dependent on the water supply available to Westlands and San Luis, and the agricultural economy resulting therefrom, based on existing Section 9(e) water contracts.

The Federal Circuit's decision, which analyzes the rights of all contracts executed pursuant to Sections 9(e) and 9(d), 43 U.S.C. § 485h(d), thus creates grave and serious implications to federal water contract holders throughout the West.

SUMMARY OF ARGUMENT

It is a longstanding principle of reclamation law that "the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project." *Nevada v. United States*, 463 U.S. 110, 126 (1983). In this case, the Federal Circuit violated that principle, allowing Reclamation to assume the role of a "water utility" provider. In so doing, the Federal Circuit has created uncertainty over important rights accorded under reclamation law to holders of Section 9(e) contracts, such as Amici and those they represent.

In the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, as amended, 43 U.S.C. § 371, *et seq.*, Congress authorized Reclamation to enter into contracts with water users whereby the federal government would construct the works and deliver the water, and the water users would pay for the water and the construction costs over a set term. Once the construction costs had been paid, certain conditions on the use of water developed by a federal reclamation project would be lifted and the contractors would obtain permanents right to their share of the project's water yield. Owing to the Great Depression, however,

many water users were unable to pay off the construction charges.

Hence, in the Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187, *codified at* 43 U.S.C. § 485h(e), Congress restructured the 1902 Act's repayment-type contracts to permit greater flexibility in the repayment period, while still allowing for the transfer of ownership. These contracts became known as "Section 9(d)" contracts. Also in the 1939 Act, Congress created a new type of contract, the Section 9(e) contract, which allowed water users to contract for water with Reclamation even when the total construction cost (to be passed on to the water users) was not yet known. Section 9(e) contracts came in two types: short-term (with a contractual period of ten years or less) and long-term (with a contractual period of more than ten years). In the years following the 1939 Act's passage, confusion emerged regarding whether and to what extent a Section 9(e) water contract provided the same benefits as a Section 9(d) contract.

To disperse this confusion and allay the fears of water users, Congress passed the Reclamation Act of 1956, Pub. L. No. 84-643, 70 Stat. 483, *codified at* 43 U.S.C. §§ 485h-1 to 485h-6, the clear intent of which was to reject Reclamation's efforts to use Section 9(e) contracts to preclude water users from repaying construction costs and obtaining a permanent right to project water. But the Federal Circuit's decision threatens radically to upset the common understanding of the rights of Section 9(e) contract holders established by the 1956 Act, for several reasons.

First, the Federal Circuit's analysis contains unjustifiably broad statements that purport to minimize the rights of long-term Section 9(e) contracts. Perhaps most importantly, the court's decision refers to Section 9(e) contracts as "merely . . . contract[s] to receive project water." Pet. App. 13a, 17a. In so doing, the decision raises significant doubt as to whether long-term Section 9(e) contract holders have a permanent right to obtain the water developed by a federal reclamation project once the project's construction costs have been paid.

To interpret a Section 9(e) contract as solely a contract to receive project water is entirely inconsistent with the purpose of the 1956 Act namely, to make clear that long-term Section 9(e) contractors have the obligation to pay a rate component for construction costs, as well as a right to have their capital payments credited against their obligation to repay such costs. 43 U.S.C. § 485h-1(6). The Act also provides long-term Section 9(e) contractors with the right to enter into a Section 9(d) contract, with credit for payments made, "at such time as the . . . remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under said subsection (d)." *Id.* § 485h-1(2). This requires, for the CVP at least, a determination that the project is complete so that the portion relative to irrigation assignable to each contractor is capable of calculation. *Id.* Most critically, contractors under both Section 9(d) and (e) contracts have the same rights to crediting of capital payments and for establishing a right to a fixed share of the "project's available water supply for . . . irrigable lands." *Id.* § 485h-1(3)-(4). But the Federal Circuit's determination that Section 9(e) contractors do

not have repayment contracts because they are not required to repay construction costs is simply not reconcilable with the 1956 Act.

In fact, the 1956 Act repeatably characterizes repayment contracts as available under both Sections 9(d) and 9(e). *See, e.g.*, 43 U.S.C. § 485h(e) ("In lieu of entering into a repayment contract pursuant to the provisions of subsection (d)); 43 U.S.C. § 485f(b) ("repayment contract . . . in accordance, as near as may be, with the provisions [of sections 9(d) or 9(e)]"). Strangely enough, the Federal Circuit's decision recognizes that Congress passed the 1956 Act with the express purpose of assuaging water users fears that, without legislative action, Reclamation would treat long-term Section 9(e) contracts as just "utility" contracts containing no assurances to permanent water rights. Pet. App. 15a-16a. Yet, the Federal Circuit's decision creates those fears anew by casting Section 9(e) contracts as qualitatively different from and inferior to Section 9(d) contracts.

Second, the Federal Circuit's decision compounds the fears of those who have Section 9(e) contracts by holding that such contracts do not encompass "construction charges" and cannot, for that reason, enjoy the benefits of a Section 9(d) repayment contract under the 1939 and 1956 Acts. The court's discounting of the significant construction charges that all Section 9(e) contract holders pay not only subverts the 1956 Act's ameliorative purpose, it threatens to nullify Section 9(e) contract holders' substantial, multi-year payments intended specifically to repay the costs of Reclamation projects.

Third, the significant uncertainty that the Federal Circuit's decision creates for all Section 9(e) contract

holders does not stop with federal reclamation law. State water law provides protections to water users, protections that, in the case of a federal reclamation project, are contingent upon the rights accorded under contracts executed pursuant to Sections 9(d) and 9(e). The Federal Circuit's decision, because it could be interpreted to undermine existing rights held by Section 9(e) contractors, might also undermine existing protections under state law and thus have devastating impacts to Amici and the interests they represent.

Given the large amounts of reclamation water delivered pursuant to long-term Section 9(e) contracts for agricultural, domestic, and industrial uses throughout the West (and particularly in California), and the critical imperative of having a sure and sound right to that water, the Federal Circuit's decision interpreting the rights and obligations of Section 9(e) contract holders merits review in this Court.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL CIRCUIT'S DECISION WILL HAVE NATIONWIDE IMPACT

Shortly after Congress passed the 1956 Act to allay water-users' concerns regarding Reclamation's misuse of Section 9(e) contracts, this Court granted certiorari in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), to determine the rights of would-be Section 9(e) contract holders in California's Central Valley. In its opinion, the Court observed:

> As to the rights and duties of the United States under the [Section 9(e)] contracts, these are matters of federal law on which

> this Court has final word. Our construction of the contract might dispel any features thereof found offensive.

Id. at 289 (citation omitted).

More than half a century later, the matters now before the Court on writ of certiorari are of capital significance to thousands of California farmers, water users, and countless others throughout the Nation that reap the benefit of the Central Valley's productivity. The stakes could not be higher. While the water woes present in California in the 1950s were no doubt serious, *see Ivanhoe Irrigation Dist. v. All Parties & Persons, etc.*, 350 P.2d 69, 76-77 (Cal. 1960), they pale in comparison to today's troubles.

In ongoing litigation challenging water delivery restrictions to the Central Valley purportedly required by the Endangered Species Act, 16 U.S.C. §§ 1531-1544, Judge Wanger of the Eastern District of California has repeatedly noted the serious impacts of water shortages on the people of the Central Valley. *See generally Consol. Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 62006, at *94-*109 (E.D. Cal. May 27, 2010). For example, the court has found that current water delivery cutbacks could cause or have already caused: (1) a loss of urban water supply sufficient to meet the annual needs of 2.6 million people, *id.* at *99; (2) a loss of almond production of 140,000 acres, *id.* at *99-*100; (3) an increased reliance on permanent crops, which puts farmers at greater economic risk than row crops, *id.* at *101; (4) a sharp increase in the percentage of land left fallow, leading to an increase in dust and particulate matter and a concomitant reduction in air quality, *id.* at *102; (5) losses of thousands of agricultural jobs, and reductions in farm

workers' wages, *id.* at *103-*04; and (6) significant increases in groundwater pumping (potentially leading to overdraft), requiring increased energy, and causing land subsidence, *id.* at *105-*06—all of which have led the court to conclude that "the harms [caused by water shortages] to the affected human communities [are] great." *Id.* at *148. Added to this continuing socio-economic turmoil is the Federal Circuit's decision, which could be interpreted to undercut the expectations of Section 9(e) contract holders, the same contract holders who must supply the beleaguered farmers and townsfolk of the Central Valley with water.

Below, Amici explain how the Federal Circuit's decision will raise uncertainty for all Section 9(e) contract holders in a way that can only exacerbate the economic and social distress currently plaguing California's Central Valley.

A. The Federal Circuit's Decision Unjustifiably Treats All Section 9(e) Contracts Alike, and Improperly Characterizes the Obligations of Section 9(e) Contract Holders

The principal issue addressed by the Federal Circuit's decision is whether Reclamation must afford the benefits of Section 9(d) and long-term Section 9(e) contracts to those who have short-term Section 9(e) contracts. Pet. App. 9a. In holding that short-term Section 9(e) contracts enjoy few if any of the benefits accorded Section 9(d) and long-term Section 9(e) contracts, the Federal Circuit made a number of characterizations of Section 9(e) contracts generally that are inconsistent with federal reclamation law and

threaten substantially to undercut Section 9(e) contract holders' rights.

The first and most serious error made by the Federal Circuit is its description of a Section 9(e) contract as "merely a contract to receive project water." Pet. App. 13a, 17a. In its attempt to differentiate Section 9(e) contracts from Section 9(d) contracts, the Federal Circuit expressed the view that:

> The 1956 Act merely made it "possible for the Secretary of the Interior in approving so-called 'water service' and 'utility type' contracts to meet objections" of the landowners with respect to renewability, crediting, and permanent water rights. Thus, 9(e) contracts continued to be treated as "water service" or "utility-type" contracts, distinct from 9(d) contracts and the repayment-type contracts envisioned by the 1902 Act.

Pet. App. 17a (citation omitted; emphasis added).

Although the Federal Circuit apparently recognized that the 1956 Act was intended to reject the proposition that Section 9(e) contracts are mere water-service contracts, the court's decision nevertheless repeatedly refers to Section 9(e) contracts generally as "water service" or "utility-type contracts." Without doubt, Section 9(d) contracts are different from Section 9(e) contracts, but the Federal Circuit's devaluation of all Section 9(e) contracts is simply without basis or precedent.

For example, the Federal Circuit stated that, "[u]nder a 9(e) contract, by contrast, the landowner assumes liability only for a variable annual charge for

the delivery of irrigation water." Pet. App. 24a (emphasis added). The assertion is plainly incorrect: Section 9(e) contracts can and often do assume liability for much more than a variable annual charge for the delivery of irrigation water. Indeed, under the 1956 Act, Reclamation can assign a fixed charge for capital costs (distinct from operation and maintenance costs). *See* 43 U.S.C. § 485h(e).

In fact, in accordance with the CVP Irrigation Ratesetting Policy, approved by Reclamation in 1988, Section 9(e) contractors within the CVP, including Amici Westlands, San Luis, and others represented by Amicus Water Authority, pay water rates that contain components designated by Reclamation as "operation and maintenance" and "capital" costs, the latter comprised primarily of the costs of construction.

Moreover, federal law governing the CVP requires CVP Section 9(e) contractors to pay capital construction costs. As noted above, Section 104 of Public Law 99-546 (Oct. 27, 1986), provides:

> The Secretary of the Interior shall include in all new or amended contracts for the delivery of water from the Central Valley Project a provision providing for the automatic adjustment of rates by the Secretary of Interior if it is found that the rate in effect may not be adequate to recover the appropriate share of the existing Federal investment in the project by the year 2030.

Reclamation's policy and federal law omit any distinction between Section 9(e) and Section 9(d) in the requirement that the investments—the capital

construction costs—of the federal government be repaid through contract rates.

Thus, within the CVP, no statute differentiates between those costs appropriated through a Section 9(e) contract (whatever its term length) and any other Reclamation water contract.[2]

B. The Federal Circuit's Decision Gravely Mischaracterizes the Nature of the Payments Made by Both Short- and Long-Term Section 9(e) Contract Holders

The Federal Circuit's decision concludes that Section 9(e) contracts do not require the payment of construction charges and, for that reason, do not merit the benefits conferred by Section 9(d) contracts. Pet. App. 25a-26a, 33a. In reaching that conclusion, the Federal Circuit failed to recognize that Section 9(e) contracts can and do include capital cost components similar or in some cases identical to cost components in Section 9(d) contracts.

The court also afforded too much significance to how a Section 9(d) contract, as opposed to a Section 9(e) contract, incorporates a general obligation to repay construction costs. For example, the decision observes that the "1939 Act expressly states that 9(d) repayment contracts include a "general repayment

---

[2] Further, the Federal Circuit's statement that the holder of a Section 9(e) contract "assumes liability for only a variable annual charge" cannot be reconciled with the court's characterization of the 1956 Act's purpose to confer the right to "cease paying the 'construction component' of the total use charge when the payments in excess of the government's operation and maintenance charge equaled the construction cost of the project." Pet. App. 16a.

obligation." Pet. App. 27a. True enough, but the statutory benefits that Section 9(d) contracts enjoy derive from their being "repayment contracts." *See* 43 U.S.C. §§ 485h(e), 485h(d). It is of course reasonable to conclude that contracts containing a "general repayment obligation," like those executed under Section 9(d), should be categorized as "repayment contracts." But it does not follow that *only* such contracts should be so characterized, especially where contracts executed under Section 9(e) require the payment of "an appropriate share of such fixed charges" that Reclamation deems necessary to pay for "that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. § 485h(e). This charge, practically speaking, amounts to the same thing as a general repayment obligation.[3]

A "repayment contract" is defined as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). In turn, "construction charges" are defined as "the amounts of principal obligations payable to the United States." *Id.* § 485a(d). It is undisputed that Section 9(e) contracts of all stripes contemplate payment of construction charges. Yet the Federal Circuit held that, although construction costs paid to Reclamation under the rubric of Section 9(d)'s "general repayment obligation" are cognizable as "construction costs" for a "repayment

---

[3] Reclamation law also expressly refers to Section 9(e) contracts as a species of repayment contract. *See, e.g.*, 43 U.S.C. § 485f(b) ("For any project . . . in connection with which a repayment contract has not been executed, . . . a repayment contract may be negotiated, in the discretion of the Secretary, . . . in accordance, as near as may be, with the provisions in subsection 9(d) or *9(e)* of this Act.") (emphasis added).

contract," construction charges that are paid to Reclamation by virtue of Section 9(e)'s "fixed charges" obligation are not "construction costs" paid pursuant to a "repayment contract." Thus, the Federal Circuit's decision could be interpreted to afford substantial benefits to one class of water contract holders but to deny those same benefits to another class of water contract holders, even though Reclamation receives the same benefits and the contract holders incur the same obligations. Such a result would not only be unjust, but, for the reasons noted above, would run counter to the CVP Irrigation Ratesetting Policy and Public Law 99-546. The mechanism for collecting such costs is more on the order of utility-type charges, but these charges nevertheless comprise the repayment of construction costs and fit within the statutory definition of repayment contracts. In multi-facility projects like the CVP, a fixed repayment obligation has not been found capable of calculation due to ongoing constructions activities, and rates under Section 9(e) contracts have provided the practical resolution to the recapture of the federal investment.

* * * * *

If left to stand, the Federal Circuit's ruling could be interpreted in a manner that deprives Section 9(e) contractors of important rights currently afforded them under federal reclamation law, a result that would cause instability in an already troubled region that, for now at least, produces a significant percentage of this country's food supply. *See Latino Issues Forum v. EPA*, 558 F.3d 936, 949 (9th Cir. 2009) ("The San Joaquin Valley is one of the nation's top producing agricultural areas, sometimes referenced as 'the nation's salad bowl"); *see also Tehama-Colusa Canal Auth. v. United*

States DOI, 2010 U.S. Dist. LEXIS 64213, at *4 (E.D. Cal. June 28, 2010). The court's decision not only threatens the water rights of Amici and those they represent, it also raises the specter of a significant injustice, by suggesting that Reclamation is authorized to charge Amici, those they represent, and others for the cost of a benefit that they will never receive.

II

THE FEDERAL CIRCUIT'S DECISION CREATES MUCH UNCERTAINTY FOR FEDERAL WATER CONTRACT HOLDERS, PARTICULARLY IN CALIFORNIA, BY INCREASING THE RISK THAT THESE CONTRACT HOLDERS WILL LOSE IMPORTANT RIGHTS UNDER STATE LAW

"Certainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the acquisition and use of water rights. *Id.* Having a clear statement of the rights of Section 9(e) contract holders is especially important in California, because the state's application and determination of water remedies involving the CVP is contingent upon federal law.

For example, California has codified a common law "no injury" rule, whereby a water user is permitted to change use so long as the change does not injure other water users' rights of use. *See* Cal. Water Code §§ 1702, 1706, 1707, 1725, 1736; *Kidd v. Laird*, 15 Cal. 161, 181 (1860) ("[I]n all cases the effect of the change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper."). Under California's articulation of the "no injury" rule, only those "others" who had "rights" to the water involved can claim "injury," and these can show "injury" only by demonstrating an injurious effect on their "rights" to the water involved in the change.

Unlike other states, California has determined as a matter of law that users of CVP water are contemplated to have "rights" within the scope of the "no injury" rule. In the seminal *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006), the California court of appeal held that the "no injury" rule applied "to all "legal user[s] of the water involved" in the change request, including those who lawfully use water under contract with the appropriator." *Id.* at 805. In other words, California gives protection to Section 9(e) water users because these users have a "right" to their water. The Federal Circuit's decision, characterizing Section 9(e) contracts as the disfavored cousins of Section 9(d) contracts and arguably defining the rights of Section 9(e) contract holders as mere recipients of water service, obfuscates the true rights accorded by the 1956 Act, rights that include, upon repayment of construction costs, a permanent right to water that is protected by the "no injury" rule. The ambiguity caused by such a strained interpretation

could undermine the protections accorded under state law to Section 9(e) contractors. Until now, there was no ambiguity in the law—these contract holders could rely on the salutary effects of the "no injury" rule to keep other waters users from harming their interests.

Thus, because the Federal Circuit's decision could be read as depriving all Section 9(e) contract holders of the power to acquire water rights from Reclamation, it could complicate and interfere with water users' erstwhile rights under state law. If that were the result, the adverse impacts of the Federal Circuit's decision would be felt in a particularly harmful way by Section 9(e) contract holders in California, among them the Amici, as well as those they represent.

CONCLUSION

For decades, this Court has resolved important questions of water rights. As water becomes scarcer and demand increases, the long-term certainty of water provided by Reclamation is of paramount import not only to Amici and their respective members but also to vast numbers of Americans who benefit from the use of Reclamation water. Whether it is through the immense economic development made possible by Reclamation water, or the everyday necessity of food, millions of people can be affected by a decision creating uncertainty in the long-term water rights of Reclamation water. The Federal Circuit's decision needlessly and wrongfully creates this injurious

uncertainty. Amici urge the Court to grant the petition for writ of certiorari.

DATED: August, 2010.

Respectfully submitted,

EILEEN M DIEPENBROCK
JON D RUBIN
ANTHONY J. CORTEZ
Diepenbrock Harrison, P.C.
400 Capitol Mall
Sacramento, CA 95814
Telephone (916) 492-5000
Facsimile (916) 446-4535
ediepenbrock@diepenbrock.com

GARY SAWYERS
Sawyers & Holland, LLP
652 W Cromwell Ave , Ste 101
Fresno, CA 93711
Telephone (559) 438-5656
gsawyers@sawyerslaw.com

*DAMIEN M SCHIFF
**Counsel of Record*
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834
Telephone (916) 419-7111
Facsimile (916) 419-7747
dms@pacificlegal org

Counsel for Amici Curiae San Luis & Delta-Mendota Water Authority, Westlands Water District, & San Luis Water District